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SYMPOSIUM: THE FUTURE OF ELECTION LAW

ADDRESS

MONEY, POLITICS, AND LOBBYING⁺

Jan Witold Baran⁺⁺

This symposium is convened during a historic week. The country and the world witnessed the peaceful transition of government to the forty-fourth President of the United States before the largest crowd ever assembled in the capital city. Beneath the simple and short ceremony of swearing in the commander in chief lies a lot of preparation and organization. An inauguration has several producers. The ceremony at the Capitol building is controlled by Congress, and the expenses of that event are paid by an appropriation of government funds. Similarly, the parade is organized by the armed forces. The other inaugural festivities, such as the concerts, balls, parties, receptions, and parade tickets are the responsibility of the privately organized and privately funded entity known as the Presidential Inaugural Committee, or PIC. This year, the PIC raised record amounts of money in ways that reflect the cross-currents of our symposium topics, which I call money, politics, and lobbying.

The PIC, like a candidate campaign committee, must file a report with the Federal Election Commission and disclose the name and address of every donor of more than \$200.¹ This is a recent legal requirement which resulted from the Bipartisan Campaign Reform Act of 2002,² (BCRA), often referred to as McCain-Feingold. In addition, any donor who is a lobbyist or an entity that employs lobbyists must disclose PIC donations of more than \$200 on a lobbying report as a result of the Honest Leadership and Open Government

⁺ This text appears substantially as it was delivered on January 23, 2009. Citations are provided for the reader's convenience, reference, and further research.

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1. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 308(a)(2), 116 Stat. 81, 103–04 (codified as amended at 36 U.S.C. § 510(b) (2006)).

2. *Id.* (codified in scattered sections of the U.S.C.).

Act of 2007 (HLOGA).³ However, this year there presumably will not be any lobbyist donations to report. President Obama imposed a ban on contributions from corporations, lobbyists, or Political Action Committees (PACs) to his inaugural committee.⁴ No law, including the recent reforms in McCain-Feingold and HLOGA, prohibits such donations. Rather, the President adopted a ban on such donations presumably because he believes it is politically prudent and beneficial.

The dynamics of the inaugural reflect the increasingly complicated dynamics of political campaigns and the rules that regulate them. There are constitutional requirements, laws, regulations, issues of private and public funding, disclosure, contribution limits, self-imposed policies, and huge amounts of money. The estimated cost of the presidential inaugural was several hundreds of millions of dollars. While the PIC declined donations from corporations and lobbyists, it readily sold multimillion dollar broadcast rights to media entities (who, by the way, employ lobbyists) to help pay for its parties and events. And like the Obama campaign, it apparently did not suffer from its self-imposed ban on lobbyist donations because it had thousands, if not millions, of non-lobbyist donors who gave up to \$50,000.

The starting point for both an inaugural and a political campaign is the same. The Constitution establishes the term of office and the oath that must be taken by the elected president. Election campaigns operate under safeguards from the First Amendment. The Constitution sets forth principles that are at the core of how we campaign and how we are governed. Often, the tensions and ambiguity of a constitutional doctrine arise when money is involved.

When the Supreme Court, in 1976, held that certain campaign financial activities are protected by the First Amendment, many disagreed.⁵ As Justice Stevens said over twenty years later, “[m]oney is property; it is not speech.”⁶ In a very limited sense, he is correct. Money is a thing, and is not speech, except perhaps for symbols and phrases that appear on bills such as “In God we Trust,” which is the government’s speech, not private speech. The First Amendment protects our speech, not the government’s speech. But Justice Stevens’ point proves too much. If money is property and not speech, then one can also claim that newsprint is processed wood pulp, not speech, and travel is movement, not speech, and word-processing machines are devices to launch encrypted electrons, not speech. What is obvious from all of these examples is

3. Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 203(a)(d)(1)(D), 121 Stat. 735, 742–43 (codified as amended at 2 U.S.C. § 1604(d)(1)(F) (Supp. 2008)).

4. Jonathan Weisman & Shailagh Murray, *In D.C., Obama Meets with Clinton*, WASH. POST, June 6, 2008, at A4; BarackObama.com, Obama Campaign Airs Two New Television Ads Across Texas (Feb. 27, 2008), http://www.barackobama.com/2008/02/27/obama_campaign_air_two_new_tv.php (last visited June 28, 2009).

5. *Buckley v. Valeo*, 424 U.S. 1, 54 (1976).

6. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

that newsprint for papers, travel by people who want to go places to make speeches, and devices that create words are part of effecting speech. Moreover, they cost money, which is necessary to implement effective communication. That is why the Supreme Court in *Buckley* noted that a law that allows someone to spend no more than \$1000 to communicate about a candidate is like a law that allows citizens to travel by car as much as they want on one tank of gasoline.⁷ Both a spending limit on communications and a restriction on travel impair protected activity.

The Court recognized that money is not speech but is indispensable to speaking. The *Buckley* decision has withstood the tests of challenges and reforms. It recognized the validity of limits on contributions to campaigns in order to prevent potentially corrupt arrangements. At the same time, it struck down limits on how much a campaign could spend, and it struck down attempts to limit the amount of public communications that speakers could finance without collaborating with a campaign.⁸ The McCain-Feingold law sought to expand the universe of regulation in several ways. It banned contributions from minors.⁹ It banned and/or regulated independent advertising that mentioned the name of a candidate in pre-election periods.¹⁰ It also created a mechanism whereby candidates who were opposed by so-called "millionaires" would be eligible to raise larger amounts of money from contributors.¹¹ It also federalized fundraising by political parties by prohibiting the solicitation, collection, or use of "soft money," which predominantly were funds from corporations and unions.¹²

McCain-Feingold was enacted after several decisions by the Supreme Court which appeared to lessen the scrutiny of campaign finance laws.¹³ Several Justices, particularly Justice Breyer, urged the court to give legislators great deference because they presumably were directly familiar with the campaign process and the steps needed to preserve its integrity. This was an odd suggestion in light of the history of campaign finance legislation. For example, public financing was passed and signed into law by President Nixon only after the Democratic Congress agreed that the law would not be effective until after Nixon's 1972 re-election campaign.¹⁴ Not coincidentally, the

7. *Buckley*, 424 U.S. at 19 n.18.

8. *Id.* at 19–20, 54–58.

9. 2 U.S.C. § 441k (2006).

10. *Id.* § 434(f)(1)–(3).

11. *Id.* § 441a–1(a)(1).

12. *Id.* § 441i(a)(1)–(2).

13. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402–04 (2000) (Breyer, J., concurring).

14. Revenue Act of 1971, Pub. L. No. 92-178, §§ 801–02, 85 Stat. 497, 562–74; see also ANTHONY CORRADO ET AL., CAMPAIGN FINANCE REFORM: A SOURCEBOOK 50 (1997); Thomas Cmar, *Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 FORDHAM URB. L.J. 443, 454 (2005); Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 49 (2008).

Democratic party supported public funding because it would provide money to their presidential campaigns while limiting the spending of their historically better-financed Republican opponents.

McCain-Feingold contained its own honey pot for incumbents. The bill increased the amounts candidates could raise for their own campaigns,¹⁵ punished millionaire opponents,¹⁶ removed funding of political parties who traditionally criticize candidates of the other party,¹⁷ and criminalized pre-election advertising that tended to criticize incumbents.¹⁸ What a deal if you are a legislator who has to run for re-election! More money for me and less money for my critics. Do these motives deserve deference from the Supreme Court?

McConnell v. FEC upheld the major provisions of McCain-Feingold from facial challenges, although the ban on contributions from minors was struck down.¹⁹ The narrow decision of the Court seemed to be a retreat from *Buckley*. However, subsequent decisions have steadily pared away the *McConnell* conclusions. The Supreme Court declared the "Millionaire's Amendment" unconstitutional.²⁰ In another case involving a Vermont law that sought to limit campaign expenditures, the Court reaffirmed *Buckley*'s holding that such limits violate the First Amendment.²¹ And in *FEC v. Wisconsin Right to Life*, the Court limited the scope of the ban on pre-election advertising by allowing commentary about candidates and incumbents if it does not encourage viewers and listeners to vote for or against the individual.²² There is a case pending this term that will address whether such permitted advertising can be subject to mandatory reports with the government.²³

While the Supreme Court has repeatedly confronted cases involving campaign finance, it rarely sees cases about lobbying and lobbyists. This will likely change. I am not a lobbyist, but I know lobbyists. They seem like nice, decent people. Federal and state laws increasingly place obligations and burdens on lobbyists. These obligations include filing reports with the government and complying with restrictions on gifts and political contributions—restrictions which are greater than those imposed on any other citizens. In the aftermath of several scandals involving lobbyists and the Obama and McCain presidential campaigns that castigated lobbyists, the mere word "lobbyist" is being equated in the public mind with "crook" and "serial

15. 2 U.S.C. § 441a(a) (2006).

16. *Id.* § 441a-1(a).

17. *Id.* § 441b.

18. *Id.* § 441b(b)(2).

19. *McConnell v. FEC*, 540 U.S. 93, 231–33 (2003).

20. *Davis v. FEC*, 128 S. Ct. 2759, 2766, 2775 (2008).

21. *Randall v. Sorrell*, 548 U.S. 230, 236 (2006).

22. *FEC v. Wis. Right to Life*, 127 S. Ct. 2652, 2659 (2007).

23. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 277, 280–81 (D.D.C. 2008), *prob. juris. noted*, 129 S. Ct. 594 (2008).

killer.” Rarely does a public commentator note that lobbying is one of the five freedoms enshrined in the First Amendment: speech, assembly, press, petition for the redress of grievances, and establishment of religion. I have pondered how Congress could regulate all five freedoms at once. Imagine, how would Congress regulate a group of reporters for church-owned publications who form an association to lobby on behalf of school vouchers? There are laws that prohibit lobbyists from donating to campaigns even when there are contribution limits that supposedly prevent corruption.²⁴ There also are so-called “pay-to-play” laws which deny government contracts to firms or individuals who make contributions to certain campaigns.²⁵ We don’t know yet the extent to which the Constitution permits restrictions and burdens on individuals or organizations because they have elected to exercise a right to petition government. Some would call this punishment. Others call it good government. Under what standard will the Supreme Court review these restrictions? Will it be under so-called strict scrutiny or a lesser standard? Will the Court defer to the legislature because of their familiarity with lobbyists, or will such deference be inappropriate because legislators prefer to legislate without being bothered by pesky lobbyists?

Finally, no matter what is or is not constitutional, will the regulation of politics and lobbying be good public policy? The prohibition of alcohol²⁶ was constitutional, but it made no sense. It was bad policy. State campaign finance laws are interesting, because each state regulates differently. The state of Missouri imposed severe contribution limits that were held constitutional by the Supreme Court.²⁷ Yet, within a decade, the state revised its laws, and now many donations are not subject to limits.²⁸ Missouri imposed low limits, fought to have them declared constitutional, and then said, “never mind.” Missouri concluded that low but constitutional limits were not good policy, at least for now.

Corporate donations are illegal under federal law.²⁹ However, twenty-eight states permit corporate donations in various degree. Florida has a \$500 limit on all contributions to candidates, including corporate contributions.³⁰ Virginia has no prohibitions or limits on contributions.³¹ Virginia government

24. See, e.g., ARIZ. REV. STAT. ANN. § 41-1234.01 (2004); CAL. GOV’T CODE § 85702 (West 2005).

25. See, e.g., 2 U.S.C. § 441c(1); CONN. GEN. STAT. ANN. § 9-612(g)(2)(A) (West Supp. 2008); W. VA. CODE ANN. § 3-8-12(d) (West 2006).

26. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

27. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 382, 395–98 (2000).

28. MO. ANN. STAT. § 130.032 (West 2003), *repealed by* S.B. 1038, 94th Gen. Assem., 2d Reg. Sess. § A (Mo. 2008).

29. 2 U.S.C. § 441b(a) (2006).

30. FLA. STAT. ANN. § 106.08(1)(a) (West 2008).

31. Rhodes Beahm Ritenour, *Federal Campaign Finance Reform Based on Virginia Election Law: The Carson Act as a Simple, Effective, and Constitutional Means to Curb*

is widely recognized as effective and honest. Illinois also has no contribution limits,³² yet it has a reputation for corrupt government. Why is there a difference? Is it the culture? Is it the different types of voters? Or is it the fact that Virginia has a law that prohibits successive terms of office for its governor, which removes the need for a governor to raise money for a re-election campaign? Whatever the reasons, the presence or absence of extensive campaign finance regulation, even that which is constitutional, does not seem to predictably correlate with more honest or more effective government.

The debate thus goes on. How should the political process be regulated? How much can it be regulated? What is constitutional, and what is good policy? Absent laws, what steps will candidates and officials take for the sake of appearances and policies? During his campaign, President Obama rejected donations from lobbyists or PACs. He raised a record sum of money—\$750 million. His Inaugural Committee did the same and also raised record amounts. As President Obama took office this week, his first executive order targeted gifts to administration officials from lobbyists and restricted both the hiring of former lobbyists, as well as lobbying by officials after they depart government for the duration of his term or terms. It will be interesting to see whether these policies will be turned into law. It also will be interesting to see how these measures, whether legally imposed or voluntarily implemented, will work in a re-election campaign, or whether former administration officials in the sixth or seventh year of an Obama administration complain that the ban on lobbying impermissibly infringes on their constitutional rights.

Former British Prime Minister Tony Blair once stated that the role of money in politics is “one of the great unresolved questions of our democracy.”³³ This timely symposium may not resolve the question, but it will contribute to further thoughtful discussion.

Corruption in the Financing of Federal Campaigns, 42 U. RICH. L. REV. 123, 154, 158–60 (2007).

32. See Ciara Torres-Spelliscy, Counsel, Brennan Center for Justice at NYU School of Law, *Statement at the Elections and Campaign Reform Committee Hearing Before the Illinois General Assembly* (March 27, 2007), available at http://brennan.3cdn.net/648de8979eb8fcf119_tqm6bnnes.pdf.

33. Marco R. della Cava, *Blair Makes Quick Work of Finance Scandal*, USA TODAY, Nov. 19, 1997, at 8A.